IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI

CRIMINAL APPEAL NO. 4 OF 2001

Mr. Lubitzki Siegfried,
Central Jail, Aguada,
Sinquerim, Bardez-Goa. ... Appellant.

versus

Union of India,
through Shri M. M. Desai,
Superintendent of Customs,
New Customs House,
Mormugao, Goa. ... Respondent.

Mr. Lalit Chari, Senior Advocate with Mr. J.P.D'Souza, Advocate for the Appellant.

Mr. M. S. Joshi, Central Standing Counsel for the Respondent.

CORAM: P. V. HARDAS, J.

DATED: 7TH FEBRUARY, 2002.

ORAL JUDGMENT

The Appellant stands convicted for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act, 1985 and is sentenced to undergo Rigorous Imprisonment for ten years and to pay fine of Rs.1,00,000/-, in default to undergo Simple Imprisonment for one year. It is this conviction and sentence, as recorded by the Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No.16/99, by Judgment dated 30th October, 2000, which is challenged before me in the present Appeal.

2. The brief facts necessary for the decision of the Appeal are set out hereunder:-

On 2nd April, 1999, P.W.5, Mahesh Dessai, who was then working as the Superintendent of Customs(Intelligence), was in the departure hall, and was informed by one Customs Officer by name Pandey that during the screening of the baggage of the Appellant, some black patches were noticed on the screening machine. Shri Pandey had also informed P.W.5, Mahesh Dessai, that it is suspected that the Appellant who was travelling by air to Germany, was carrying some contraband goods. P.W.5, Mahesh Dessai, told the Customs Officer Shri Pandey to secure the panchas and he also told some other Officers to keep a watch on the Appellant. The Appellant went to the Airlines counter and after checking in at the said counter, the Appellant went to the Imigration counter and then to the Customs counter. At the Customs counter, P.W.5, Mahesh Dessai, asked the Appellant whether he was carrying any contraband goods. The Appellant is said to have informed P.W.5, Mahesh Dessai, that he was carrying some food stuff and clothes. Meanwhile, the presence of the panchas had been secured and were present at the Customs counter. The Appellant was taken to the checking counter where the Appellant identified his baggage. The said bag was identified on the basis of the comparison of the luggage tag attached to the said bag and the counter-foil which was attached to the Appellant's ticket. The Appellant was also

carrying a hand bag, passport, ticket etc. The baggage of the Appellant was then brought to the arrival hall and the Appellant was again asked whether he was carrying any contraband goods and he replied that he was carrying only food stuff. In the presence of the panchas, the Appellant was asked to open the baggage. The bag contained clothes, food stuff, wood carvings and a gift pack, wrapped in yellow colour paper. On removing the wrapping paper, a cardboard box was noticed. On opening the cardboard box 246 dark colour cylindrical sticks wrapped in transparent tapes, believed to be hashish was found. The box was weighing 2.730 grams and the hashish sticks without the wrappings weighed 1.960 kgs. The weight of the wrapping paper was 770 grams. The weighing was done with the help of a weighing scale which was found in the hand bag of the Appellant. Two samples of 30 grams each were taken from the cylindrical sticks suspected to be hashish. Each sample of 30 grams was put in a plastic bag separately heat sealed and thereafter, put in separate(brown envelopes) and packed and sealed. One sample envelope was marked as Sample 'A' and the other was marked as Sample 'B'. The envelope was sealed with the seal of "Customs Preventive Number 5". The signatures of the Accused, panchas, Sealing Officer and Seizing Officer was taken on the said envelope. The remaining balance quantity was put in a polythene

bag and thereafter in a white cloth bag which was stitched and sealed with the seal of the Customs. Thereafter, the yellow colour cloth bag was searched and the weighing scale was found. The yellow bag was then put in the suit case and the suit case was then tied with a rope, sealed and signed. The gift wrapping of the cardboard box and the other wrappings were put in a white cloth bag, wrapped and sealed. The Appellant was then taken to the Customs House at Marmagoa and special permission was taken from the Assistant Commissioner of Customs to open the ware house for depositing the samples and exhibits as 2nd April, 1999 was a holiday. The samples and the other exhibits were deposited in the ware house at Panaji. Exh.P.W.2/A is the Office note and Exh.P.W.2/B is the letter to the ware house officer. Exh.P.W.2/C is the receipt of the deposit of the articles in the ware house. P.W.5, Mahesh Dessai, after having obtained the possession of the ticket, passport and the boarding card from the Appellant had asked the Appellant whether a search could be taken before a Gazetted Officer or a Magistrate and the Appellant is said to have replied that it was not required. No incriminating articles were found during the personal search of the Appellant. The sample was sent to the Food and Drugs Administration for examination and a report was received that the sample was hashish. A report at

Exh.P.W.5/A was sent by P.W.5, Mahesh Dessai, to his superiors on 5th April, 1999. After completion of the investigation, P.W.5, Mahesh Dessai, filed a complaint in the Court. The boarding card, ticket and the passport are at Exhs.P.W.3/D, P.W.3/C and P.W.3/B.

3. The learned Special Judge, N.D.P.S. Court, Mapusa, vide Exh.8 framed a charge against the Appellant for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act, 1985. The Appellant pleaded not guilty and claimed to be tried. The prosecution in support of the charge examined five witnesses. P.W.1, Mahesh Kaissare, Junior Scientific Assistant in the Directorate of Food and Drug Administration examined the samples and gave his report at Exh.P.W.1/B that the samples sent for analysis was hashish. P.W.2, Fatima Noronha, speaks about the deposit of the samples and the articles in the ware house on 2nd April, 1999. C. W. is Dr.Ashutosh Prabhu Dessai, who had examined the Appellant on 18th January, 2000 on being referred by the Superintendent of Central Jail, Aguada. He had also examined the Appellant on various other dates and found that the patient was malingering(feigning). P.W.3, is Subash Hegde, a panch witness in whose presence hashish came to be seized and the panchanama is at Exh.P.W.3/A. P.W.4, is Gajanan M. Malik, Superintendent of Customs at Marmagoa who was

present at the time of search and seizure and P.W.5, is Mahesh Dessai the Seizing Officer.

4. Mr. Lalit Chari, the learned Senior Advocate has urged before me (i) that in view of the discrepancy between the substantive evidence and the panchanama at Exh.P.W.3/A, the prosecution has not been able to show that the Appellant was found in possession of contraband. According to him, the evidence relating to the search, seizure and sealing is weak and is doubtful. (ii). According to the learned Senior Advocate appearing for the Appellant, the Officer who noticed dark patches on the screen has not been examined. (iii). Prior to opening of the bag, no offer was made to the Appellant towards compliance of Section 50. (iv). There is no evidence that copy of the panchanama was given to the Appellant. (v). There are contradictions regarding recording of the statement of the Appellant and the factum of recording of the Appellant itself becomes doubtful. (vi). There is total breach of the mandatory provision in compliance of Section 57 of the N.D.P.S. Act, 1985.

5. Mr. Lalit Chari, the learned Senior Advocate appearing for the Appellant has invited my attention to Exh.P.W.5/A, which is a report which was forwarded by P.W.5, Mahesh Dessai, to his superiors. The report

bears the signature of P.W.5, Mahesh Dessai and beneath the signature the date "5th April,1999" is put. P.W.5, Mahesh Dessai, in the cross-examination has stated that "on 3rd April, 1999 I was busy preparing the report Exh.P.W.5/A. I signed the report on 5-4-1999. I now say that Exh.P.W.5/A was signed by me on 2-4-1999. The report Exh.P.W.5/A was complete on 2-4-1999. Since, I had to take the report to my superior on a next working day which is 5-4-1999 I changed the date from 2-4-1999 to 5-4-1999".

6. In the further cross-examination, P.W.5, Mahesh Dessai, has admitted that "at the time of writing Exh.P.W.3/A I was not certain whether the original sample was sent to Food and Drugs Administration. I still maintained that Exh.P.W.5/A was prepared and signed by me and sent by me on 2-4-1999". In the further cross-examination, P.W.5, Mahesh Dessai, says that "Exh. P.W.5/A was prepared by him either on 2-4-1999 or 3-4-1999". He, however, maintained that the said report Exh.P.W.5/A was prepared before 5-4-1999. A perusal of P.W.5/A would show that at internal page no.3, there is a reference that the original sample has been handed over to Food and Drugs Administration Office at Panaji for analysis of the contents on 5-4-1999. In the last para, at the same page of Exh.P.W.5/A, there is a reference to the

statement of the caretaker being recorded on 3-4-1999. A xerox copy of the original of Exh.P.W.5/A is included in the paper book and is at page 155. With the assistance of the learned Senior Advocate appearing for the Appellant, I have also perused Exh.P.W.5/A from the record of the Trial Court. From the perusal of report Exh.P.W.5/A, it is clear that this report Exh.P.W.5/A was not prepared either on 2nd or 3rd April,1999, as is solemnly stated by P.W.5, Mahesh Dessai. This report was either prepared on 5-4-1999 or thereafter. In the report at Exh.P.W.5/A, there is a reference to the sample being sent for analysis on 5-4-1999. P.W.5, Mahesh Dessai, has deliberately made an incorrect statement that Exh.P.W.5/A was prepared either on 2nd or 3rd April, 1999.

7. The learned Senior Advocate appearing for the Appellant, after inviting my attention to a false statement made by P.W.5, Mahesh Dessai, in respect of his report Exh.P.W.5/A, has then invited my attention to the evidence of panch P.W.3, Subash Hegde and P.W.5, Mahesh Dessai. According to P.W.3, Subash Hegde, each sample weighing 30 grams was put in a polythene bag and was separately packed and sealed. He states that the polythene bag was heat sealed and then put in a brown colour envelope which was then wax sealed with the seal of the Customs Department. P.W.5, Mahesh Dessai, also

states that each sample of 30 grams was put in a plastic bag, heat sealed and thereafter put in a brown envelope, packed and sealed. The recitals in the panchanama in respect of the sealing reads as under:-

> "Both the samples are placed in polethene which is heat sealed and placed in another heat sealed polethene packets separately. Each packet is kept in a light brown colour paper envelope which is again kept in light green colour paper envelope and sealed with preventive department, Goa Customs brass seal No.5".

8. Thus, the recital in the panchanama shows that both the samples were placed in a polythene bag which was heat sealed and placed in another heat sealed polythene bag. Each sample was then kept in a light brown colour paper envelope which was again kept in a light green colour paper envelope and sealed with the Customs seal. Thus, seals were applied to the outer cover of the samples which was a green colour paper envelope. The substantive evidence of P.W.3, Subash Hegde and P.W.5, Mahesh Dessai, is that the seals were applied to a brown colour envelope. Curiously, both these witnesses do not make a reference to a green colour envelope.

9. P.W.3, Mahesh Dessai, when cross-examined,

stated that it was recorded in the panchanama that a brown colour envelope was sealed. Confronted with this omission, he could not give any answer as to why there is no reference in the panchanama that seals were affixed to a brown colour envelope. He admits to have read the panchanama before signing and he also admits to have read that the brown colour paper envelope was again kept in a green colour paper envelope and sealed with the seal of the Customs. The portion at point 'A' to 'A' in the panchanama in respect of sealing of the green colour envelope was confronted to this witness and he admitted that before signing the panchanama, he was not aware that the above version from point 'A' to 'A' was wrong. In the further cross-examination, he admits that he had discussed the portion at points 'A' to 'A' in the panchanama at Exh.P.W.3/A with the learned Public Prosecutor before his evidence. He also states that when he was summoned to depose before the Court and he was aware that the portion in the panchanama from point 'A' to 'A' was incorrect. He was confronted with the absence of the signature of either the Customs Officer or the Accused on Exhs.P.W.3/B, P.W.3/C and P.W.3/D which are the air ticket, boarding card etc. He admitted that it is mentioned in the panchanama that these three articles were signed by the Appellant and the Seizing Officer.

10. P.W.5, Mahesh Dessai, had filed a complaint in the Court of the Special Judge, N.D.P.S., Mapusa and at para 24, it is stated, which is reproduced as under:-

> "Each of the said packets were again placed in light brown colour paper envelopes which in turn were put into two light green paper envelopes and then sealed with the Preventive Department Goa Customs brass seal no.5".

11. P.W.5, Mahesh Dessai, states that he was present at the time of writing of the panchanama and at that time, two brown envelopes containing 30 grams of the substance was in front of them when the panchanama was being written. He categorically denies that the two brown envelopes were put in green colour paper envelopes. He also states that no seals were affixed to the green colour paper envelopes when the panchanama was written. He also states that at the time of signing of the complaint, he was aware that no green colour envelopes were sealed. He states that he was also aware at the time of signing the complaint that there was no green colour paper envleope which was marked as "Sample 'A' Original" and the other marked as "Sample 'B' Duplicate". Despite this, he still maintains in the cross-examination that when he signed the complaint, he was not knowing that there was a

mistake with reference to the sealing of the green colour paper envelope. He admits that before signing the complaint, he had read the complaint as to what was stated in the panchanama. He states that he realised the mistake about 15 days back when he was perusing the report marked as Exh.P.W.5/A. In the further cross-examination, he admits which is reproduced hereunder:-

> "However I had read the panchanama when it was written. I found it was correctly recorded at that time. And at that time it was not mentioned in the panchanama that two sample envelopes containing 30 gms. each of brown colour envelope were not mentioned that the envelopes were put in green colour envelope. I say in the panchanama it was mentioned that only brown colour envelopes were packed and sealed and there was no mention of green colour envelopes".

12. From the perusal of the evidence of P.W.3, Subash Hegde and P.W.5, Mahesh Dessai, and the perusal of the panchanama at Exh.P.W.3/A, it is clear that the sample which was placed in the brown colour envelope was then placed in a green colour paper envelope. The seals had been applied to the green colour paper envelope. The samples received for analysis by P.W.1, Mahesh Kaissare, were placed in a brown colour paper

envelope with seals of the Customs Department affixed to the brown colour paper envelope.

13. A panchanama, is certainly not a substantive piece of evidence. A panchanama can be used either to corroborate or to contradict. A panchanama assumes importance in view of the fact that it is a contemporaneous document which is scribed and signed at the scene of the offence. As per the evidence of P.W.5., Mahesh Dessai, the panchanama at Exh.P.W.3/A was scribed simultaneously with the various steps taken by the Officers in the search and seizure of the contraband. I have no hesitation, therefore, in accepting that the recitals in the panchanama at Exh.P.W.3/A, at point 'A' to 'A' that the brown paper envelope was put in a green colour paper envelope and the seals of the Customs Department were affixed to the green colour paper envelope as true. I am fortified in my view as a reference to the green colour paper envelope is to be found not only in the panchanama at Exh.P.W.3/A but at para 24 of the complaint presented by P.W.5, Mahesh Dessai. A deliberate attempt has been made by P.W.3, Subash Hegde and P.W.5, Mahesh Dessai by stating a falehood in the Court that the seals were affixed to a brown colour paper envelope. They feign ignorance regarding placing of the samples in a green colour paper envelope.

14. It is extremely distressing to note the casual manner in which the search and seizure have been carried out. The scribe of the panchanama has not been examined. The witnesses do not refer to as a mistake in scribing the panchanama that the brown colour paper envelope was put in a green colour paper envelope in their examination-in-chief. A deliberate attempt by stating a falsehood has been made by P.W.3, Subash Hegde and P.W.5, Mahesh Dessai to cover up this lacuna in the prosecution case. I find that in view of this discrepancy, neither P.W.3, Subash Hegde nor P.W.5, Mahesh Dessai can be relied upon. The sanctity of sealing the sample at the scene of the offence which is generally corroborated by a panchanama and fortified by the testimonies of the witnesses is completely destroyed in this case. There is no guarantee that what was seized from the possesion of the Appellant was the same substance that was analysed by P.W.1, Mahesh Kaissare. It is difficult to sustain a conviction in the face of such evidence.

15. Mr. M. S. Joshi, the learned Central Standing Counsel appearing for the Respondent has urged before me that the samples were in fact placed in a brown colour envelope on which the seals were affixed. A reference to the green colour envelope in the panchanama Exh.P.W.3/A is a minor discrepancy which

does not go to the root or core of the prosecution case and the entire prosecution case does not deserve to be jettisoned on this count. This submission of the learned Central Standing Counsel appearing for the Respondent is devoid of any merit. The entire sanctity attached to the sealing has been destroyed coupled with the fact that P.W.5, Mahesh Dessai, is shown to have made a false statement in respect of the date on which the report Exh.P.W.5/A was scribed. According to me, this discrepancy goes to the core of the prosecution case and if the prosecution is not able to establish by cogent evidence the seizure of the contraband, I am afraid the benefit will have to be extended to the Accused. On such evidence, I cannot persuade myself to uphold the conviction of the Appellant.

16. In the result, therefore, Criminal Appeal No.4/2001 is allowed. The conviction and sentence of the Appellant for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act, 1985, as recorded by the Special Judge, N.D.P.S. Court, Mapusa, by Judgment dated 30th October, 2000, in Special Criminal Case No.16/99 is hereby quashed and set aside and the Appellant is acquitted of the aforesaid offence. The Appellant be set at liberty forthwith if not wanted in any other case.